Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1258

PETER TERRITO, JOHN CHANTREY, EDWARD A. BLANCHARD, AL BOSSIER, EDWIN HARTZMAN and HENRY R. CARTER,

Appellants

versus

CURTIS POCHE, JR. and VELMA POCHE, widow of Curtis Poche, Sr., Individually and as Administratrix of her Minor Children, Whitney Poche and Patricia Poche,

Appellees

ON APPEAL FROM THE SUPREME COURT STATE OF LOUISIANA

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO.

PETER TERRITO, JOHN CHANTREY, EDWARD A. BLANCHARD, AL BOSSIER EDWIN HARTZMANN and HENRY R. CARTER,
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CURTIS POCHE, JR. and VELMA POCHE, widow of Curtis Poche, Sr., Individually and as Administratrix of her Minor Children, Whitney Poche and Patricia Poche,
Appellees

ON APPEAL FROM THE SUPREME COURT, STATE OF LOUISIANA

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Supreme Court, State of Louisiana, dated December 10, 1977, reversing the Court of Appeal, Fourth Circuit, State of Louisiana.

THE OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is reported at 339 So.2d 1212 (La. 1976), *rehearing denied* December 10, 1976. The opinion of the Court of Appeal is reported at 329 So. 2d (La. App. 4th Cir. 1976).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to both 28 U.S.C. §§ 1257(1) and 1257(2), this being an appeal which draws into question the validity of and the conflict between 33 U.S.C. § 933(i) (a provision of the Longshoremen's and Harbor Workers' Compensation Act) and Louisiana Revised Statute 23:1101 as interpreted by the Louisiana courts beginning with *Kimbro vs. Holladay*, 154 So.2d 369 (La. App. 2nd Cir. 1934) and continuing through *Canter vs. Koehring Co.* 283 So. 2d 716 (La. 1973). A Notice of Appeal was filed in the Supreme Court, State of Louisiana on January 10, 1977, together with a Request to Certify and Transmit the Entire Record. The constitutionality of 33 USC § 933(i) and La. Rev. Stat. 23:1101 was brought into issue and the decision of the Supreme Court of Louisiana favored the Louisiana Statute. Likewise the conflict between the federal and state statute was brought into question under the "Supremacy Clause" of the United States Constitution, Article VI, Clause 2. The Supreme Court of Louisiana a) acknowledged the statutory conflict but refused to examine that conflict; or b) declined to hold that the federal statute preempted or superceded the operation of the conflicting provision of state law. The result is a holding that state law supercedes federal law, that the state statute is not in fatal conflict with the federal statute under the Supremacy Clause, or that 33 USC § 933(i) is unconstitutional.

In the event that the Court does not consider appeal to be the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 USC §2103.

QUESTIONS PRESENTED

Whether Louisiana Revised Statute 23:1101 as interpreted by the Louisiana supreme and appellate courts conflicts with Section 933(i) of the Longshoremen's and Harbor Workers' Compensation Act so as to result in a finding that the operation of the state statute is repugnant to the federal Act promulgated pursuant to the United States Constitution.

STATEMENT OF THE CASE

Curtis Poche, Sr. was killed in the course and scope of his employment with Avondale Shipyards, Inc., Jefferson Parish, Louisiana. Appellees filed a survival and wrongful death suit in the 24th Judicial District Court, State of Louisiana, against Avondale Shipyards, Inc. and the named individual defendants (appellants) alleging general negligence counts against appellants as executive officers and fellow employees of the decedent. An Exception of No Cause of Action (a state procedure similar to a Rule 12b Motion to Dismiss for Failure to State a Claim, Federal Rules of Civil Procedure) was filed by appellants and prior to oral argument all counsel stipulated as follows:

A. Decedent was an employee of Avondale Shipyards, Inc. within the definition of "employee" found in the Longshoremen's and Harbor Workers' Compensation Act, 33 USC §902(4).

B. Avondale Shipyards, Inc. is an employer within the definition of "employer" under the Act. 33 USC §902(4).

C. Decedent was killed in an adjoining area customarily used by an employer in building a vessel.
33 USC §903(a).

The District Court maintained the Exception after oral argument and denied plaintiffs' Motion for New Trial for Reargument Only. The Court of Appeal affirmed on the basis of a conflict between 33 USC §933(i) and La. Rev. Stat. 23:1101 and held that the immunity granted to fellow employees and officers by the federal statute must prevail. The Supreme Court of Louisiana reversed in an opinion dated November 8, 1976, holding either that the conflict between the statutes did not exist or that the conflict did not render the state statute invalid or that the conflict between the statutes should not have been examined. Application for re-hearing was timely filed and denied on December 10, 1976.

The federal questions were raised in the District Court, in the Court of Appeal through Assignments of Error and in appellants' brief to the Supreme Court of Louisiana.

This case brings into question the validity of a state statute permitting tort suits against fellow employees in the face of a conflicting provision of a federal law specifically immunizing these same fellow employees. The applicable section of the respective statutes follow:

33 USC §933(i) provides:

> The right to compensate or benefits under this chapter shall be the exclusive remedy to an em-

> ployee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, that this provision shall not affect the liability of a person other than an officer or *employee of the employer.*

La. Rev. Stat. 23:1101 provides:

> When an injury for which compensation is payable under this Chapter has been sustained under circumstances creating in some person (in this Section referred to as third persons) other than the employer a legal liability to pay damages in respect thereto, the injured employee or his dependent may claim compensation under this Chapter and the payment or award of compensation hereunder shall not affect the claim or right of action of the injured employee or his dependent against such third person, nor be regarded as establishing a measure of damages for the injury; and such injured employee or his dependent may obtain damages from or proceed at law against such third person to recover damages for the injury.

Fellow employees and executive officers have been included by Louisiana courts in the category of the "third persons" referred to above. *Kimbro vs. Holladay*, 154 So. 369 (La. App. 2nd Cir. 1934) and subsequent decisions.

The Louisiana law as interpreted by the Louisiana state courts clearly permit so called "executive officer" tort suits; likewise, the federal statute prohibits same by conferr-

ing an immunity from suit upon decedent's fellow employees and executive officers. The parties stipulated that Curtis Poche was an employee who came under the provision of the Longshoremen's Act, as amended. Similarly, there exists no question that the individual defendants (appellants) were fellow employees of Curtis Poche. The Louisiana Supreme Court was confronted with the conflict at issue between the federal and state law as reviewed by the lower courts. The majority opinion of the highest Louisiana court is ambiguous in many respects but the court did recognize the conflict inherent in the statutes, 339 So. 2d 1212, 1221, but refused to recognize federal preemption or supremacy, 339 So. 2d at 1221. The result is a denial of the immunity granted to appellants by the federal Act, a result tantamount to a striking down of 33 USC § 933(i) in the face of the Louisiana statutory - jurisprudential tort remedy.

The federal question is substantial under the decisions of the Court construing conflicts between federal and state law, *Perez vs. Campbell*, 402 US, 637 (1971), *Hines vs. Davidowitz*, 312 US 52 (1941), and *Florida Lime and Avocado Growers, Inc. vs. Paul*, 373 US, 132 (1962), and decision concerning federal preemption in an area of state interest. *Bethlehem Steel Co. vs. New York State Labor Relation Board*, 330 US 767 (1947). Finally, when a final decision of a state court has sustained validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter of right. *Huffman vs. Pursue, Ltd.*, 95 S.Ct. 1200 (1975).

Appellants suggest that a full and complete exposition of the issue is required for adequate resolution of the problem involving a sensitive issue of federal - state relationships

under the Longshoremen's Act as amended. The decision will affect the rights of every longshore and shipbuilding employee in the State of Louisiana and appellants submit that the controversy merits plenary consideration.

CONCLUSION

For The Foregoing Reasons, Probable Jurisdiction Should Be Noted.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I certify that three copies of the Jurisdictional Statement was served upon all counsel of record by depositing same in a United States mail box, first class postage prepaid, addressed to counsel of record at their post office addresses. March 9th, 1977.

DONALD A. HAMMETT

APPENDIX A

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF LOUISIANA

NO. 57,966

AVONDALE SHIPYARDS, INC., PETER TERRITO, JOHN CHANTREY, EDWARD A. BLANCHARD, AL BOSSIER, EDWIN HORTZMAN and HENRY C. CARTER

Appellants

VS.

CURTIS POCHE, JR. and VELMA POCHE, WIDOW OF CURTIS POCHE, SR., INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATES OF HER MINOR CHILDREN, WHITNEY POCHE AND PATRICIA POCHE

Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed Jan 10, 1977

Notice is hereby given that Peter Territo, John Chantrey, Edward A. Blanchard, Al Bossier, Edwin Hortzman and Henry C. Carter, appellants named above, hereby appeal to the Supreme Court of the United States from the final judgment of this court reversing the Court of Appeal, Fourth Circuit, State of Louisiana entered in this action on

December 10, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257 (1) and 1257 (2).

Alternatively, appellants submit this appeal be regarded as a petition for writ of certiorari under 28 U.S.C. § 2103.

s/ Donald A. Hammett
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CERTIFICATE OF SERVICE

I certify that a copy of the Notice of Appeal was served upon all counsel of record by depositing same in a United States mail box, first class postage prepaid, addressed to counsel of record at their post office addresses.

s/ Donald A. Hammett

APPENDIX B

WRIT OF REVIEW TO THE COURT OF APPEAL, FOURTH CIRCUIT PARISH OF ORLEANS, STATE OF LOUISIANA

SUPREME COURT OF LOUISIANA

NO. 57,966

CURTIS POCHE, JR. AND VELMA POCHE, WIDOW OF CURTIS POCHE, SR., INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATES OF HER MINOR CHILDREN, WHITNEY POCHE AND PATRICIA POCHE

V.

AVONDALE SHIPYARDS, INC., PETER TERRITO, JOHN CHANTREY, EDWARD A. BLANCHARD, AL BOSSIER, EDWIN HORTZMAN AND HENRY C. CARTER

CONSOLIDATED WITH

NO. 57,906

ALDRICH ADAMS

V.

ED HARTZMAN, ET AL.

Filed Nov 8 1976

WRIT OF REVIEW TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS STATE OF LOUISIANA

MARCUS, Justice

This case involves two independent suits consolidated for our consideration because they present a common issue. In one suit, the widow and children of Curtis Poche, Sr. filed a third party negligence action against Avondale Shipyards, Inc., Poche's employer, and certain named executive officers of Avondale Shipyards, Inc. pursuant to La. R.S. 23:1101 for the wrongful death of their husband and father, respectively. On August 17, 1973, Curtis Poche, Sr., in the course and scope of his employment by Avondale Shipyards, Inc., was engaged in new ship construction in a shipyard area located entirely over land when the section of the ship to which his scaffold was attached suddenly broke away from the rest of the structure and collapsed, causing him to fall and be fatally injured.

The plaintiff in the second suit, Aldrich Adams, sustained personal injuries in the course and scope of his employment by Avondale Shipyards, Inc. on October 28, 1974, while he was working entirely over land as operator of a crane being used in new ship construction. He was struck on the head and neck by a piece of ship framework which swung around unexpectedly as it was being moved by the crane. Plaintiff made several executive officers and fellow employees defendants in a negligence action filed pursuant to La. R.S. 23:1101.

Defendant executive officers and fellow employees in both suits filed exceptions alleging no right or cause of

action claiming that the benefits afforded by the Longshoremen's and Harborworker's Compensation Act (LHCA) were available to plaintiffs and thus excluded all rights, remedies and benefits otherwise provided by the Louisiana Workmen's Compensation Act. Avondale Shipyards, Inc. also filed an exception of no cause of action to the suit instituted by Curtis Poche, Jr., et al. From judgments maintaining defendants' exceptions and dismissing their suits, plaintiffs appealed to the Fourth Circuit where their cases were consolidated for consideration. The appeal court affirmed the judgments below,[1] holding that, although the LHCA and Louisiana compensation acts may operate concurrently as to injuries occurring on land, a plaintiff who elects to sue under state law may not recover against executive officers and fellow servants since recovery against same would conflict with the prohibition of such suits embodied in the federal act.

The appeal court additionally affirmed the trial court's judgment sustaining the exception filed by Avondale Shipyards, Inc. and dismissing Avondale from the *Poche* suit. We granted writs of certiorari to consider the correctness of the judgments of the court of appeal.[2]

The issues presented for our consideration are narrow yet difficult ones involving the delicate balance to be maintained between state and federal laws which purport to

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1. Poche v. Avondale Shipyards, Inc., 329 So. 2d 211 (La. App. 4th Cir. 1976); Adams v. Hartzman, 329 So. 2d 218 (La. App. 4th Cir. 1976).

2. 322 So. 2d 280.

govern the same area of activity. We must decide (1) whether a worker injured on land and covered by the LHCA[3] may elect to pursue the remedies afforded under the workmen's compensation law of Louisiana, and (2) if so, whether the state compensation law is to be applied in its entirety or only insofar as its provisions are compatible with those embodied in the federal legislation.

Prior to the enactment of the 1972 amendments to the LHCA, the coverage of the act was defined as follows:

. . . .

> (3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
>
> (4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.) 33 U.S.C. §902.
>
> (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and *if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . .* 33 U.S.C. §903. (Emphasis added.)

3. All parties stipulated that both injured workers were within the coverage of LHCA as amended.

It is undisputed that the LHCA before 1972 had no application to injuries occurring on land; state compensation acts constituted the sole remedy available, even to traditionally maritime workers who happened to be injured on shore. Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969). The principle that local not maritime law governed workers injured on land was reiterated in Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971). At the same time, however, the United States Supreme Court intimated that under the authority granted in Articles I and III of the United States Constitution, Congress might legislate compensation coverage for maritime workers injured in shoreside accidents.[4]

Congress apparently responded to the invitation in *Nacirema* and revised the coverage of the LHCA in 1972 to extend benefits to certain classes of maritime workers who performed their duties on land. The coverage provisions were expanded as follows:

4. Our attention has been directed to the recent case of Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976) decided by the United States Court of Appeals for the Fifth Circuit holding that the 1972 amendments to LHCA were a constitutional extension of the admiralty jurisdiction by Congress. The court further notes that, because of the disposition of this issue, it need not reach the question of whether the 1972 amendments were an exercise of Congress' power under the commerce clause as well. We do not consider this holding conflicts with our conclusions that there is no constitutional impediment to the concurrent operation of the LHCA and Louisiana Workmen's Compensation Act with respect to injuries sustained on land in the course of new ship construction and that the 1972 amendments do not preempt the state law in this field under the facts and circum stances herein expressed.

(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). 33 U.S.C. § 902.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . .33 U.S.C. § 903(a).

Defendants argue that the 1972 amendments to the LHCA have the effect of preempting the power of this state to provide a compensation remedy to maritime workers injured on

our soil. Their principal contentions are: (1) that the need for uniformity in the field of admiralty law demands that federal law operate exclusively as to covered workers; (2) that the history and wording of the LHCA evidence a Congressional intent that federal law in this area be preeminent; and (3) that even if concurrent operation of the two compensation laws is permissible, state law must yield where its provisions conflict with those of the federal act.

We do not agree with any of these contentions.

THE EXTENSION OF LHCA INLAND

The history of workmen's compensation as it relates to longshoremen, harborworkers, and others injured on navigable waters in the course of their employment has been a long and tortuous one. In 1917, the United States Supreme Court held, in a divided opinion, that a state compensation law could not constitutionally be applied to a longshoreman who was killed aboard a ship in navigable waters while engaged in unloading cargo. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). The Court emphasized that under the facts of the case, the matter was clearly within traditional admiralty jurisdiction and therefore not subject to the diverse legislation of the various states. The Court noted however that, while "it is difficult, if not impossible to define with exactness just how far the general maritime law may be modified or affected by state legislation, that this may be done to some extent cannot be denied. . . ." The rule was announced that state legislation would be permissible unless "it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its internation-

al and interstate relations." In 1917, a majority of the Court felt that this rule was violated when a state provided workmen's compensation to a stevedore injured on navigable waters. It is noteworthy, however, that the *Jensen* Court did not suggest that the uniformity of the maritime law was jeopardized when state compensation laws were applied to the same workers injured on shore, doubtless because at that time admiralty jurisdiction in tort was largely tied to the situs of the injury on navigable waters. That state law could constitutionally apply to longshoremen injured on land was confirmed in State Industrial Commission v. Nordenholt Corp., 259 U.S. 263 (1922).

Thereafter, in Grant Smith-Porter Shipping Co. v. Rhode, 257 U.S. 469 (1922), the Supreme Court crossed its own line of demarcation between state and federal jurisdiction and held that, if the nature of an employee's work was of "local concern," a state compensation act could apply without working a material prejudice to the federal maritime law, even if the injury occurred on navigable water.

In 1927, Congress passed the Longshoremen's and Harborworker's Compensation Act, 33 U.S.C. § 901 *et. seq.*, which provided a federal compensation remedy for workers injured on navigable waters *"if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."* 33 U.S.C. § 903(a). This language of the act appeared to make the state and federal compensation remedies exclusive and engendered much confusion over which cases involved interests that were "maritime but local" and thus cognizable under state as opposed to federal law.

In Davis v. Department of Labor & Industries, 317 U.S.

249 (1942), the Supreme Court coined the phrase "twilight zone" to describe the shadowy area in which it was difficult to determine whether state or federal law should apply. In this area, if a worker elected to apply for state benefits his choice would be upheld and the application of state law presumed constitutional. In subsequent cases, the Court made it clear that an area of concurrent jurisdiction existed in workers injured on navigable waters,even when their occupations were traditionally maritime, could pursue remedies available under state compensation laws. Hahn v. Ross Island Sand & Gravel Co.,358 U.S. 272 (1959);Richard v. Lake Charles Stevedores,Inc.,95 So. 2d 830 (La. App. 1st Cir. 1957) cert.denied 355 U.S. 952 (1958); Baskin v. Industrial Accident Commission,338 U.S. 854 (1949);Bethelehem Steel Co. v. Moore,335 U.S. 874 (1948). Although dicta in the Supreme Court's decision in Pennsylvania Railroad Co. v. O'Rourke,344 U.S.334 (1953) referred to the LHCA as an exclusive remedy,the Court's comments were made in a case involving a contest between two federal compensation systems (FELA and LHCA). Moreover, in Calbeck v. Travelers Insurance Co.,370 U.S. 114 (1961),the Court judicially excised the troublesome clause in the LHCA "if recovery. .may not validly be provided by State law,"which had created the implication that state and federal compensation systems were exclusive.The Court held that LHCA benefits would be available for all workers injured on navigable

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5. Both the *Moore* and *Baskin* cases involved workers engaged in the repair of completed vessels over navigable waters. It had formerly been held that such injuries were within the exclusive federal maritime jurisdiction and thus beyond the protection of state compensation remedies. John Baizley Iron Works & Span, 281 U.S. 222 (1930). Nevertheless, the Supreme Court affirmed the state court's award of state benefits in *Moore* and reversed the denial of state benefits in *Baskin*, which denial had been based on the alleged exclusivity of the LHCA remedy.

waters, whether or not a particular injury might also have been within the constitutional reach of a state compensation act. In so ruling, the Court did not suggest that the availability of federal benefits thereby excluded the operation of state law, but rather stated that its decision was consistent with *Davis* and the twilight zone concept. We note particularly the discussion in *Calbeck* of the decision in Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366 (1953). In that case, the LHCA was held applicable to a fatal injury occurring on land to an employee engaged in the repair of a vessel which was physically located on a marine railway inasmuch as such a railway was comparable to a dry dock, an area specifically covered by LHCA. With regard to the LHCA coverage, the *Calbeck* Court noted that "at the same time, since the injury did, in a physical sense occur on land, there is little doubt that a state compensation act could validly have been applied to it."

In our own court, in Ellis v. Travelers Insurance Co., 241 La. 433, 129 So. 2d 729 (La. 1961), we were persuaded by a decision of the United States Court of Appeal for the Fifth Circuit that as to a longshoreman performing maritime work at the time of injury aboard a vessel afloat on navigable waters the LHCA was the exclusive remedy. Flowers v. Travelers Ins. Co., 258 F.2d 220 (5th Cir. 1958). Our decision in *Ellis*, however, and the *Flowers* decision, on which we heavily relied, was reached without the benefit of the Supreme Court's opinion in *Calbeck*. Subsequently, in Arp v. Maryland Casualty Company, 170 So. 2d 166 (La. App. 4th Cir. 1964), the Fourth Circuit held that at least as to a shore based repairman injured aboard a vessel, the state compensation system could apply. We denied writs

with the notation: 'On the facts found by the Court of Appeal, there appears no error of law in its judgment." 247 La. 411, 171 So. 2d 666 (1965).

What can be gleaned from an examination of these cases is that the United States Supreme Court has made it clear that state compensation laws can be constitutionally applied concurrently with the federal compensation system to some, if not all, categories of maritime workers. While the Court has never overruled *Jensen*, it has demonstrated that the uniformity of the federal maritime law is not materially prejudiced by the operation of state compensation remedies even in areas where the federal law is also applicable.[6] Now that the amendments to LHCA cover land-based workers traditionally falling under the exclusive coverage of state acts, we see little reason to conclude that the concurrent application of the two compensation systems is any more inimical to the maritime law than was the case before the 1972 amendments.

We are reinforced in our conclusions by the recent decision of the United States Supreme Court in Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973). In commenting on the shoreward extension of admiralty jurisdiction in the Admiralty Extension Act, 46 U.S.C. § 740, the Court noted:

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6. See discussions of concurrent jurisdiction in A. Larsen, The Conflict of Laws Problem Between the Longshoremen's Act and State Workmen's Compensation Acts, 45 So. Calif. L. Rev. 699 (1972).

> While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the framers, it hardly follows from the constitutionality of that extension, that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the states. . . . Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law.

The Court further stated that *Jensen* has been confined to its facts, *viz.*, to suits relating to the relationships of vessels, plying the high seas and our navigable waters, and to their crews. The fact that a whole system of liabilities was established on the basis of the reasoning in that case, the Court noted, led years ago to the establishment of the twilight zone where state regulation was permissible. Thus, even subsequent to the passage of the 1972 amendments to the LHCA, the Court seems to have reaffirmed the notion that state and federal compensation systems can co-exist, at least in cases with facts distinguishable from those in *Jensen*.

Accordingly, we find no constitutional impediment to the concurrent operation of the LHCA and Louisiana Workmen's Compensation Act with respect to injuries sustained on land in the course of new ship construction.

FEDERAL PREEMINENCE IN THE FIELD

Defendants argue that, even if state law may constitutionally apply to workers covered by LHCA, state law must

nevertheless yield to federal preemption of the field. It is well settled, however, that the mere fact that Congress enacts a law in a given area does not thereby exclude the power of a state to apply its laws governing the same subject matter. In fact, where Congress legislates in a field traditionally occupied by state law, it is assumed that the historic police powers of the state were not to be superseded by federal act unless that was the clear and manifest purpose of Congress. Rice v. Santa Fe Elevator Corporation, 331 U.S. 218 (1947). In Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), the Court made the following observations concerning federal preemption:

> . . . The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.
>
> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulator, power in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. . . .

As stated in Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973):

> Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law.

The general rule to be derived from these cases and others dealing with the question of federal preemption is that state power is not preempted unless: (1) it was the clear and manifest purpose of Congress to do so, or (2) the exercise of dual authority is repugnant to the Congressional objective.

The disputed LHCA amendments make no express declaration that Congress has preempted the right of states to compensate those land-based longshoremen and harbor workers to whom federal benefits were extended. In fact, there has been no change whatsoever in the coverage provisions of the act itself warranting the conclusion that the LHCA is any more exclusive now than it was prior to 1972 when, as we have already observed, state and federal compensation laws operated concurrently as to many injuries. In fact, the troublesome clause which suggested that the state and federal systems were exclusive, "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law," was deleted in the 1972 revision of the act. This change prompted the following academic commentary:

> Its deletion leaves the statute blank on the relationship of the expanded federal system to the state system. A vague idea of 'federal preeemption' should not lead us to the unfortunate and unnecessary conclusion that the state statuates can now operate only up to (and never beyond) the newly demarcated federal line.

G. Gilmore & C. Black Law of Admiralty 425-26 (2nd ed. 1975). Nor can we find a clear manifestation of congressional intent to preempt state law in the legislative history

of the 1972 amendments. With regard to the landward extension of LHCA, the Congressional committee which studied the amendments made the following comments:

> The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. The following are the maximum limits on the compensation payable for permanent total disability in some maritime States:

California	$70.00
Florida	56.00
Hawaii	112.50
Louisiana	49.00
Maryland	85.68
Massachusetts	77.00
New Jersey	101.00

New York	80.00
Oregon	62.50
Pennsylvania	60.00
Texas	49.00

[1] Plus $6 for each dependent.

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victims of an injury.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of

the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to *permit* a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a per-

> son who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

U.S.Code Cong. & Admin. News 1972, pp. 4698, 4707. (Emphasis added.)

Our examination of the legislative history leaves us unconvinced that Congress intended to exclude workers injured on land from their remedies under state compensation laws. The intent was clearly to make the liberal benefits provided by the LHCA uniformly *available* to longshoremen and harborworkers regardless of on which side of the water's edge their injuries were sustained. The legislators noted the meager benefits provided by some states and demonstrated a desire to *"permit"* a uniform compensation system to apply to employees who would otherwise be covered by this act for part of their activity.

There is nothing in the legislative history to suggest that Congress intended to overrule the line of cases recognizing a state's concurrent right to provide compensation for injuries sustained in maritime pursuits of local concern even though the worker was covered by the LHCA. It is pertinent to observe that, in discussing its intention to repudiate the judicial extension of the warranty of unseaworthiness to longshoremen in third party suits against a vessel, the congressional committee discussed in detail the Supreme Court decisions it intended to overrule. We are satisfied therefore that neither the history nor the wording of the 1972 amendments manifest a clear purpose to preclude the applicability of state compensation law in the new land areas covered by the federal act.

Defendants further contend that the pervasiveness of the federal compensation system and regulations promulgated thereunder are facts from which a Congressional intention to preempt state law can be implied. It has not been demonstrated, however, that the regulations issued pursuant to the LHCA as amended are any more pervasive than those handed down prior to the 1972 revisions. Moreover, we note that the pervasiveness of federal regulation and superintendence of the field was never a bar to concurrent application of state and federal law to injuries over water in the pre-1972 era. We are not persuaded that arguments grounded in the pervasiveness of federal regulation are any more compelling now that the LHCA has moved inland nor that the operation of the state compensation law would frustrate the purpose or objectives of the federal act. If the concurrent applicability of the two systems as to certain classes of workers injured over water did not present a significant conflict when state law was elected by injured workers, it is difficult to comprehend how the concurrent operation of the compensation systems over land can generate conflicts of a more serious nature. We are in agreement with the appeal court's determination of this issue.

THIRD PARTY ACTIONS AGAINST EXECUTIVE OFFICERS AND FELLOW EMPLOYEES

La. R.S. 23:1101 gives an injured party the right to "obtain damages from or proceed against such [a negligent] third party to recover damages for the injury." Our jurisprudence has interpreted third parties within the contemplation of this statute to include fellow employees and executive officers. Canter v. Koehring Co., 283 So. 2d 716

(La. 1973).[7] Grigg v. Martin, 269 So. 2d 331 (La. App. 2d Cir. 1972); Jolly v. Travelers Ins. Co., 161 So. 2d 354 (La. App. 4th Cir. 1964). Defendants argue that in this respect the Louisiana Workmen's Compensation Act is in direct conflict with the LHCA which provides:

> The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

That the provisions of the state and federal compensation laws with respect to third party negligence actions are different cannot be disputed. We are of the opinion, however, that once the initial determination was made that the LHCA and state compensations statutes could operate concurrently,the appeal court was in error to reexamine the question of state-federal conflict with respect to particular provisions of the acts. It is obvious that unless the state statute provides benefits or rights beyond those accorded by federal law, there would be no reason to elect to pursue the state remedy. To hold, as did the appellate court, that a plaintiff may elect state law but only insofar as the rights accorded thereunder do not exceed those provided in the federal scheme is to render meaningless the right to make the initial election. We find it particularly significant that

7. This interpretation of La. R.S. 23:1101 has now been legislatively overruled to prohibit suits against executive officers and fellow employees. La. Acts 1976, No. 147.

workers who chose to pursue state remedies during the pre-1972 era were allowed to take advantage of the state law in its entirety. The courts did not compare particular provisions of the laws with a view to harmonizing differences.

In sum, it is our opinion that the 1972 amendments to the LHCA were intended to provide additional benefits for land-based maritime workers rather than to deprive them of rights and remedies which they already had. Louisiana has a legitimate interest in assuring the applicability of its compensation laws to injuries sustained within its jurisdiction. Accordingly, there should be no compelling reason to prohibit the legislature of this state from making available what, to some plaintiffs, may be a more attractive compensation scheme, so long as double recovery is not permitted. Until this court is confronted with authority to the contrary, we decline to hold that the compensation law of this state is preempted from operating in an area of traditionally local concern.

Accordingly, we reverse the decision of the appeal court insofar as it held that state law regarding suits against executive officers and fellow servants cannot be availed of by a plaintiff who has elected to proceed under the Louisiana Workmen's Compensation statute. However, we note a distinction in the cases before us for review which the appeal court failed to discern. The widow and children of Curtis Poche, Sr. elected to sue under the state law and declined to accept LHCA benefits when they were offered by Avondale Shipyards. Conversely, it was stipulated at trial that plaintiff Aldrich Adams was receiving compensation payments under the LHCA. We are of the opinion that Adams, having availed himself of the benefits under the LHCA, has elected to pursue his remedies under the federal compen-

sation statute. No argument to the contrary has been made. Since the LHCA prohibits suits against officers and fellow employees, the decision of the appeal court affirming the ruling of the trial judge and dismissing the suit instituted by Adams is correct. Furthermore, we are unable to say that the court of appeal erred in affirming the trial court's ruling which sustained Avondale Shipyards' exception to the *Poche* suit; nor has any error in the court of appeal judgment in this regard been urged before us.

DECREE

For the reasons assigned, the judgment of the court of appeal affirming the trial court's ruling which sustained the exceptions of defendant executive officers and dismissed the suit of Curtis Poche, Jr., et al., against them is reversed and the case is remanded to the trial court for further proceedings not inconsistent with this opinion, with costs assessed to defendants. However, the portion of the judgment of the appeal court affirming the trial court's ruling which sustained the exception of Avondale Shipyards, Inc. and dismissed the suit as to this defendant is affirmed.

For the reasons assigned, the judgment of the court of appeal as to plaintiff Aldrich Adams maintaining the trial court's ruling which sustained defendants' exceptions of no right or cause of action and dismissed the suit against them is affirmed at appellant's cost.

APPENDIX C

REHEARING REFUSED

UNITED STATES OF AMERICA
STATE OF LOUISIANA
SUPREME COURT OF THE STATE OF LOUISIANA

New Orleans, 70112

New Orleans, Friday, December 10, 1976

AT CHAMBERS

REHEARING REFUSED:

57,966 Poche, Jr., et al v. Avondale Shipyards, Inc., et al.
c/w
57,906 Adams v. Hartzman, et al
See Per Curiam attached.

* *

I, Andrew J. Falcon, Deputy Clerk, Supreme Court of Louisiana, do hereby certify the above to be a true and correct extract from the minutes of this Court.

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this the 7th day of March, A.D., 1977.

s/ Andrew J. Falcon
Deputy Clerk
Supreme Court of Louisiana

(SEAL)

APPENDIX D

PER CURIAM ON REHEARING

SUPREME COURT OF LOUISIANA

NO. 57, 906

ADAMS

v.

HARTZMAN, ET AL.

Dec 10, 1976

PER CURIAM ON REHEARING

Applicant Adams properly points out in his application on rehearing that there is no evidence in the record establishing that he made an election, or a choice of L. H. C. A. remedies, but only evidence that he has accepted benefits under the L.H.C.A. Act.

In light of the following cases: Calbeck v. Travelers Insurance Company, 370 U.S. 116 (1962); Holland v. Harrison Bros. C. Dry Dock and Repair Yard, Inc., 306 F. 2d 369 (5th Cir. 1962); Griffin v. Universal Underwriters Insurance Company, 283 So. 2d 748 (La. 1973); and Ryder v. Insurance Company of North America, 282 So. 2d 771 (La. App. 3d Cir. 1973), we deem it advisable to vacate our original judgment as to plaintiff Adams and to remand the case to the district court for the purpose of trying the issue of whether Adams elected federal benefits.

Furthermore, we reserve to the defendants in the case of Adams v. Hartzman, et al the right to apply for a rehearing on this issue. When final here the case of Adams v. Hartzman, et al will be remanded to the district court for further proceedings in accordance with this per curiam.

In the case of Poche, et al v. Avondale Shipyards, Inc. et al, rehearing is denied.

SUPREME COURT OF LOUISIANA
A TRUE COPY
MAR 7, 1977

s/ Andrew J. Falcon
Deputy Clerk
SEAL